INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	4
a. The development of Section 608 of the National Housing Act	4
b. The Housing Act of 1954	6
c. The facts underlying this litigation	9
d. The proceedings below	10
The questions are substantial	13
Conclusion	21
Appendix A	22
Appendix B	26
Appendix C	52
Appendix D	55

CITATIONS

Cases:	
Ayrshire Corp. v. *United States*, 331 U. S. 132	20
Bailey v. *Clark*, 21 Wall. 284	15
Barnett v. *Vaughan Institute*, 134 App. Div. 921, 119 N. Y. S. 45	16
Blanchard v. *Reconstruction Finance Corp.*, 177 F. 2d 727, certiorari denied, 339 U. S. 912	19
Calhoun v. *Massie*, 253 U. S. 170	17
Collett, Ex parte, 337 U. S. 55	17
Crane v. *Hahlo*, 258 U. S. 142	17
Cumberland Tel. Co. v. *Public Service Commission*, 260 U. S. 212	20
DeWolf v. *Ford*, 193 N. Y. 397	16
First National Bank v. *Missouri*, 263 U. S. 640	15
Fleming v. *Rhodes*, 331 U. S. 100	2
Frasier v. *Board of Trustees*, 134 F. Supp. 589, aff'd, 350 U. S. 979	20
Horowitz v. *United States*, 267 U. S. 458	18

409127—56——1

Cases—Continued — Page

Lichter v. *United States*, 334 U. S. 742 — 19
Louisville & Nashville R. R. v. *Mottley*, 219 U. S. 467 — 17
Lynch v. *United States*, 292 U. S. 571 — 18
Metropolitan Water Co., Ex parte, 220 U. S. 539 — 20
Millikan v. *United States*, 283 U. S. 15 — 19
Norman v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240 — 18
North American Commercial Co. v. *United States*, 171 U. S. 110 — 18
People v. *D'Oench*, 111 N. Y. 359 — 16
Query v. *United States*, 316 U. S. 486 — 20
Reid v. *Covert*, 351 U. S. 487 — 2
Riss & Co. v. *Hoch*, 99 F. 2d 553 — 20
Rolls-Royce v. *Stimson*, 56 F. Supp. 22 — 20
Stockdale v. *Insurance Companies*, 20 Wall 323 — 15
Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10 — 20
Thomas v. *Commercial Union Assur. Co.*, 162 Mass. 29 — 16
Union Pacific Ry. v. *United States*, 99 U. S. 700 — 18
United States v. *Hudson*, 299 U. S. 498 — 19
United States v. *149 Gift Packages, etc.*, 52 F. Supp. 993 — 20
United States v. *Stafoff*, 260 U. S. 477 — 15
United States v. *Tod*, 297 Fed. 385 — 16
Veix v. *Sixth Ward Assn.*, 310 U. S. 32 — 18, 19

Constitution and statutes:

Constitution of the United States:
Art. I, Section 10, Clause 1 — 18
Act of December 27, 1947, Section 2 — 5
Housing Act of 1948, Section 101 — 5
National Housing Act, 56 Stat. 303, as amended:
Section 607 — 5, 16
Section 608 — 4, 5, 6, 7, 9, 15, 55
Section 608 (a) — 55
Section 608 (b) — 4, 5, 16, 55
Housing Act of 1942, Section 11 — 4

Constitution and statutes—Continued Page

Housing Act of 1954, 68 Stat. 610:
Section 132 ... 8, 56
Section 513 ... 1, 8, 12, 13, 56
Section 513 (a) ... 8, 56
Section 513 (b) ... 8, 56
Section 513 (c) ... 56
Section 513 (d) ... 8, 57
Section 513 (e) ... 8, 57
Section 513 (f) ... 8, 57
Section 513 (g) ... 8, 57
Section 513 (h) ... 9, 57
Section 513 (i) ... 9, 57
Section 513 (j) ... 59
12 U. S. C. 1731 (b) ... 8
28 U. S. C. 1252 ... 2
28 U. S. C. 2201 ... 1
28 U. S. C. 2202 ... 2, 20
28 U. S. C. 2282 ... 12, 19, 59
Veterans Emergency Housing Act of 1946, 60 Stat. 207:
Section 1, 60 Stat. 207 ... 4
Section 10 (f), 60 Stat. 214 ... 5

Miscellaneous:
24 CFR 280.34 ... 5, 16
24 CFR 580.34 ... 5
89 Cong. Rec. 2145 ... 4
12 F. R. 8813, 8817 ... 5
13 F. R. 8260 ... 5
Hearings before the Committee on Banking and Currency, House of Representatives, 83rd Cong., 2d Sess., on H. R. 7839, pp. 507–515 ... 7
Hearings before the Committee on Banking and Currency, United States Senate, 83rd Cong., 2d Sess., on S. 2889, 2938, 2949, pp. 654–661 ... 7
H. Rept. No. 2039, 77th Cong., 2d Sess., p. 2 ... 4
H. Rept. No. 1429, 83d Cong., 2d Sess., pp. 17–18 ... 7
H. Rept. No. 2271, 83d Cong., 2d Sess., pp. 77–78 ... 8
Sen. Rept. No. 1300, 77th Cong., 2d Sess., p. 2 ... 4
Sen. Rept. No. 1472, 83d Cong., 2d Sess., p. 31 ... 16
Sen. Rept. No. 1472, 83d Cong., 2d Sess., pp. 30–33 ... 7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The *per curiam* opinion, dated September 22, 1955, holding that the three-judge district court should be dissolved (App. A, *infra*, pp. 22–25), is reported at 134 F. Supp. 337. The opinion of the single-judge district court on the merits, dated June 20, 1956 (App. B, *infra*, pp. 26–51), is reported at 142 F. Supp. 341.

JURISDICTION

This suit, brought under the National Housing Act, as amended, and under 28 U. S. C. 2201–2202, asked for declaratory and injunctive relief determining that, notwithstanding Section 513 of the Act, added in 1954, 68 Stat. 610, 12 U. S. C. 1731 (b), appellee has the

right to rent apartments in its building for terms of less than thirty days. The complaint alleged that application of the 1954 Act to appellee would be unconstitutional. The United States District Court for the Eastern District of South Carolina held, in its opinion of June 20, 1956 (App. B, *infra*, pp. 26–51), that the statute was unconstitutional as applied to appellee. The judgment of the district court (App. C, *infra*, pp. 52–54) was entered on July 18, 1956, and the Federal Housing Administration filed its notice of appeal in that court on August 15, 1956. On October 11, 1956, the district court extended the time for docketing the appeal in this Court from October 14, 1956, to and including November 28, 1956 (R. 295).

The jurisdiction of this Court to review the judgment of the district court by direct appeal is conferred by 28 U. S. C. 1252 and is sustained by the following cases: *Fleming* v. *Rhodes*, 331 U. S. 100; *Reid* v. *Covert*, 351 U. S. 487.

STATUTES INVOLVED

The pertinent statutes, *viz.*, Sections 608 and 513 of the National Housing Act, as amended (56 Stat. 303, 12 U. S. C. 1743, and 68 Stat. 610, 12 U. S. C. 1731 (b)), and 28 U. S. C. 2282, are set forth in Appendix D, *infra*, pp. 55–59.

QUESTIONS PRESENTED

By insuring a mortgage, appellant, the Federal Housing Administration, enabled appellee to finance and construct a building in 1949. This insurance took place pursuant to legislation which aimed to promote the construction of residential rental housing, first for war workers, later for returning veterans. The

regulations issued under the statute required that the insured project be designed principally for residential use, and they referred to apartments in such projects as dwelling units. In its charter, appellee undertook to restrict itself to the business of operating a rental housing project, and it referred to apartments in the project as dwelling units. After the completion of the project, appellee rented some of its apartments as furnished overnight accomodations for transients. The Housing Act of 1954 explicitly prohibited such rentals, regardless of whether the project was completed before or after the passage of that Act.

A single-judge district court held that the Housing Act of 1954 was unconstitutional to the extent that it prohibited rental to transients in projects theretofore approved by appellant, and ruled that appellant had no right to prohibit such rental.

The questions presented are:

1. Whether appellee's rental of apartments to transients was prohibited prior to the Housing Act of 1954, in view of the purpose of the earlier legislation and the nature of appellee's undertaking to limit its business to a rental housing project consisting of dwelling units.

2. Whether the explicit prohibition of the 1954 Act was beyond the power of Congress, as applied to a project theretofore approved.

3. Whether a single district judge had jurisdiction to determine that Congress lacked the power to impose such prohibition retrospectively and that appellant should not enforce the statute.

STATEMENT

Appellee is the owner of an apartment house located in the City of Charleston, South Carolina. Appellant made the construction of the project possible by insuring the mortgage of the building under Section 608 of the National Housing Act. This litigation involves appellee's right to rent apartments to transients, *i. e.*, for periods of less than thirty days. In setting forth the legal issues involved, we shall include a brief discussion of the pertinent legislative background.

A. THE DEVELOPMENT OF SECTION 608 OF THE NATIONAL HOUSING ACT

Section 608 was added to the National Housing Act by the National Housing Act Amendments of 1942, Section 11. Its purpose was to facilitate the construction of rental residential housing for war workers by authorizing the insurance of mortgages on construction projects [1] where "the mortgaged property [was] * * * designed for rent for residential use by war workers." [2]

The housing problems of war workers, of course, ended with the termination of the hostilities; at the same time, however, there arose the need to house the returning veterans.[3] The Veterans' Emergency Hous-

[1] Cf. the explanation of the bill on the floor of the House of Representatives by Mr. Steagall, the author of the Committee Report, at 89 Cong. Rec. 2145, "The purpose of the legislation * * * is to permit the insurance of residential construction in defense areas."

[2] Section 608 (b) (2). See also H. Rept. No. 2039, 77th Cong., 2d Sess., p. 2; Sen. Rept. No. 1300, 77th Cong., 2d Sess., p. 2.

[3] Cf. the statement of policy in Section 1 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207.

ing Act of 1946, Section 10 (f), (60 Stat. 214) continued the authority to insure mortgages under Section 608. Subsection (b) (2), however, was amended to read:

> Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Commissioner, shall be provided under such regulations and procedures as may be prescribed by the Commissioner.

Subsequent legislation restated the Congressional understanding that the authority under Title VI of the National Housing Act (including the insurance of mortgages pursuant to Section 608) was designed to assist in the construction of residential housing. The Act of December 27, 1947, Section 2, 61 Stat. 945, declares that "Title VI of the National Housing Act, as amended, shall be employed to assist in maintaining a high volume of new *residential construction* without supporting unnecessary or artificial costs" (emphasis added). In similar vein, Section 101 of the Housing Act of 1948[4] provides that no mortgage shall be insured under Section 608 unless the mortgagor certifies under oath that he will not discriminate against families with children.

24 CFR 280.34, issued by appellant pursuant to statutory authority (Section 607 of the National Housing Act), has provided since 1947:[5]

[4] 62 Stat. 1268, 12 U. S. C. 1738.

[5] 12 F. R. 8813, 8817. 24 CFR 280.34 was originally designated 24 CFR 580.34. It was renumbered 24 CFR 280.34 on December 23, 1948, 13 F. R. 8260.

> At the time the mortgage is insured the mortgagor shall have constructed and completed or shall be obligated to construct and complete new housing accommodations on the mortgaged property *designed principally for residential use*, conforming to standards satisfactory to the Commissioner and consisting of not less than eight (8) *rentable dwelling* units on one site and may be detached, semidetached, or row houses, or multiple-family structures. [Emphasis added.]

Appellant has interpreted the language "principally designed for residential use" as permitting rental to offices and stores designed to serve the permanent residents of a project, but not as authorizing rentals to transients.[6]

B. THE HOUSING ACT OF 1954

During the hearings before the Banking and Currency Committees of both the House of Representa-

[6] Cf. the testimony of Adolphus M. Prothro, Director of the Legal Division of the Federal Housing Administration, in the court below:

> Q. In your affidavit you state that it is the duty of the Legal Division to interpret the Act and that the Federal Housing Administration has interpreted the language "principally designed for residential use" to mean or to:
>
> a. allow the insurance of residences in which professional people as doctors, dentists, chiropractors, etc., might establish an office, and
>
> b. allow the insurance of multifamily housing projects in which commercial facilities catering to the needs of resident families were allocated [sic].
>
> And Paragraph 3 you state that the Federal Housing Administration has never interpreted the word "principally" to permit the use of a portion of the dwellings for transient accommodations; is that correct?
>
> A. Yes, sir.

tives and the Senate, which preceded the passage of the Housing Act of 1954 (68 Stat. 590), representatives of the hotel industry complained that many projects built with the aid of federal mortgage insurance pursuant to Section 608 had been converted into residential hotels or were taking in transients in competition with the hotel industry.[7] The House Committee took the position that FHA insurance was designed to "provide rental accommodations for family use," not to cover hotels, and that the "fact that a project has been insured should therefore be a prohibition to rental on a transient basis." The Committee did not believe, however, that remedial legislation was required. Instead, it called upon FHA to "take firm action to obtain full compliance with such contracts as have been imposed for this purpose in those contracts, making such investigation and taking such other enforcement action as may be required." See H. Rept. No. 1429, 83d Cong., 2d Sess., pp. 17–18.

The Senate Committee (S. Rept. No. 1472, 83d Cong., 2d Sess., pp. 30–33) also took the position that the complaints of the hotel industry were justified. It stated that "the benefits provided under the National Housing Act were designed to increase the supply of permanent residential housing, not to increase the supply of hotels or motels or similar establishments catering to nonpermanent residents." In contrast to the House Committee, the Senate Committee

[7] Hearings before the Committee on Banking and Currency, House of Representatives, 83d Cong., 2d Sess., on H. R. 7839, pp. 507–515; Hearings before the Committee on Banking and Currency, United States Senate, 83d Cong., 2d Sess., on S. 2889, 2938, 2949, pp. 654–661.

(and subsequently the Senate) felt that it was desirable to "clarify the intent of Congress" by specific legislation. In conference, the House agreed in principle with the position taken by the Senate (H. Rept. No. 2271, 83d Cong., 2d Sess., pp. 77–78).

As finally enacted, Section 132 of the Housing Act of 1954 (68 Stat. 610) added a new Section 513 (12 U. S. C. 1731b) (App. D., *infra*, pp. 56–59) to the Housing Act. Subsection (a) declares that since the enactment of the National Housing Act it has been the intent of Congress "that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." Subsection (b) provides that no new, existing, or rehabilitated multifamily housing, a mortgage of which is insured under the Act, shall be operated for transient or hotel purposes [8] except where such use had been authorized expressly prior to May 28, 1954, or where the building is located in an area designated to be a resort area. Under subsections (d), (f), and (g), the Commissioner of the Federal Housing Administration is "authorized and directed to enforce the provisions of this section [Section 513] by all appropriate means at his disposal." [9] Under subsection (h), the Attorney General may obtain in-

[8] *I.e.*, rented for periods of less than thirty days (Section 513 (e), App. D., *infra*, p. 57).

[9] If advised in writing of a violation, the Commissioner is to investigate the facts, and if a violation is found to exist he "shall order such violation * * * to cease forthwith." In cases of noncompliance with such order, the matter is to be referred to the Attorney General for civil or criminal action.

junctive relief against the continuation of a practice violating the statute. Subsection (i) grants the same remedy to any person owning or operating a hotel within fifty miles of the place where such violation occurs.

C. THE FACTS UNDERLYING THIS LITIGATION

In 1949, appellee planned to erect a twelve-story multi-family apartment building in Charleston, South Carolina (App. B, *infra*, pp. 26–28). It applied for FHA insurance of a mortgage for $1,357,700 pursuant to Section 608 (App. B, *infra*, p. 27). The total cost of the project amounted to about $1,676,000 (App. B, *infra*, p. 26).

The application was granted and appellee consented to the usual conditions required by FHA. Accordingly, appellant was given the position of a preferred stockholder, and appellee included in its corporate charter a number of provisions of which the following are here pertinent:

> So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commission *it shall engage in no business other than the construction and operation of a rental housing project or projects.*
>
> * * * * *
>
> *Dwelling accommodations* of the corporation shall be rented at a maximum average rental per room per month fixed by the Board of Directors and approved by the holders of the Preferred Stock [*i. e.*, appellant]. * * * *Dwelling accommodations* of the Corporation shall not be rented for a period in excess of three

> years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholder. [App. B, *infra*, pp. 28–30; emphasis added.]

When the project was completed in July 1951, it appeared that Darlington had overestimated the need for rental housing (Cf. App. B, *infra*, p. 27). Ten weeks later, less than one half of the apartments were rented. With funds obtained from its parent—the Long Corporation [10]—appellee furnished certain apartments (App. B, *infra*, p. 33). While these furnished apartments originally were rented for periods longer than thirty days, appellee began, in February 1952, to rent them for shorter periods (App. B, *infra*, p. 33). The daily charge for the room was composed of two items, one consisting of one-thirtieth of the maximum average rental for the room and a second larger one for "furniture rental." The latter was paid over to the Long Corporation, appellee's parent.[11] Appellee never applied for the approval by appellant of its schedules for the rental of furnished apartments since appellant had "indicated that such approval would be conditioned upon appellee's undertaking not to rent for periods less than thirty days" (App. B, *infra*, p. 33).

D. THE PROCEEDINGS BELOW

Appellant objected to appellee's rental of furnished apartments without an approved rental schedule as

[10] The Long Corporation held 1996 of appellee's 1999 shares of common stock. The Long Corporation, in turn, is solely controlled by L. D. Long (App. B, *infra*, p. 32).

[11] The district court found that, if the daily charge was $6.00, $2.58 would be allocated to "rent" and $3.41 to "furniture rent" (App. B, *infra*, p. 37).

early as December 1952. However, it did not force the issue until the passage of the Housing Act of 1954 (App. B, *infra,* p. 34).

In January 1955, appellant demanded that appellee execute an agreement not to accept any tenancy for a period of less than thirty days. When appellee refused to give the undertaking, a demand that the practice cease was issued on January 18, 1955 (App. B, *infra,* pp. 34–35). Appellee thereupon filed a complaint on February 9, 1955, and an amended complaint on March 10, 1955 (R. 2), in which it asked for a declaratory judgment stating the respective rights between the parties (in particular that appellee has the right to rent apartments for terms of less than thirty days), for an order enjoining appellant from interfering with appellee's operation of the apartment house, and for a preliminary injunction.

The gravamen of the complaint is that appellee had a vested right to rent its apartments for periods of less than thirty days prior to the enactment of the Housing Act of 1954, and that the 1954 Act could not constitutionally deprive it of that property right. Appellee also asserted that the statute was discriminatory, arbitrary, unjust, and inequitable in view of the provisions (a) authorizing rentals to transients in resort areas and (b) permitting hotels to obtain injunctions against practices violating the statute.

Appellant filed a cross-complaint asking for an order enjoining appellee (a) from renting any accommodations for any term less than thirty days; (b) from charging rent in excess of the schedule approved by the Commissioner; (c) from renting furnished

apartments and supplying services without the written approval of the Commission; and (d) from advertising or holding out transient or guest accommodations.

Inasmuch as the complaint alleged that Section 513 was unconstitutional on various grounds, a three-judge court was convened pursuant to 28 U. S. C. 2282 (App. D, *infra,* p. 59). Appellee objected, claiming at this juncture that appellant had misconstrued the statute by improperly giving it a retroactive effect. After an examination of the pleadings, the three-judge court dissolved itself (App. A, *infra,* pp. 22–25). It stated, in the first place, that the real question involved was one of statutory interpretation and that the constitutional question would be reached only if it were determined that the statute was intended to have retrospective application. More broadly, the court held that the grant of injunctive relief to appellee would be improper in the circumstances. Under the statute, it stated, the only action appellant could take against appellee would be to apply for an injunction, and an injunction should not be granted to restrain the issuance of an injunction. Moreover, the court reasoned, since appellant's cross-complaint (seeking enforcement of the statute) also contained a prayer for an injunction "the court's ruling on this will determine finally the rights of the parties without consideration of plaintiff's prayer for injunction" (App. A, *infra,* p. 25). The three-judge court therefore remanded the cause to a single district judge for hearing and disposition (App. A, *infra,* p. 25).

The single-judge district court implicitly rejected appellee's argument that Section 513 was not intended

to have retrospective application. It held, however, that prior to 1954 appellee had the right to rent apartments to transients; that Section 513 attempted "to create a new obligation with respect to a past transaction"; and that Congress lacked the power to do this (App. B, *infra*, pp. 43–44). In addition, the court declared that the 1954 Act was discriminatory in view of the resort-area exceptions (App. B, *infra*, p. 48).

On the other hand, the court took the position that appellee's method of renting furnished apartments constituted a subterfuge, and that appellee had no right to continue such rentals in the absence of a rent schedule approved by appellant. Such approval, however, could not be made contingent, the court held, upon an agreement not to rent for periods of less than thirty days (App. B, *infra*, pp. 37–38).

In its decree (App. C, *infra*, pp. 52–54), the district court declares that appellee has the right to rent a reasonable number, *i. e.*, fifteen per cent, of the apartments for terms of less than thirty days, and directs appellee to submit to appellant a proposed schedule of maximum average rentals for furnished apartments. The decree directs FHA to approve this schedule promptly, if fair and reasonable. It also enjoins FHA from conditioning its approval on an agreement by appellee to desist from renting for periods of less than thirty days. Finally, it enjoins appellee from advertising or otherwise soliciting the transient business.

THE QUESTIONS ARE SUBSTANTIAL

The court below—a single-judge district court—has held provisions of the Housing Act of 1954 unconsti-

tutional as applied to situations which Congress expressly sought to cover. On the basis of this constitutional determination, the decree orders FHA to approve schedules for the rental of furnished apartments by appellee without regard to the statutory command that the minimum rental period be no less than thirty days. The agency is, indeed, enjoined from insistence upon compliance with this express requirement. The court, moreover, reached this result in the face of the solemn declaration of Congress, appearing in the 1954 Act, that its intent in enacting the National Housing Act, in its original form and as amended, had been to exclude the use of insured housing for transient or hotel purposes.

The decision thus nullifies, with respect to projects insured prior to the effective date of the Housing Act of 1954, the flat congressional prohibition against the rental of insured residential housing to transients. The practical consequences of such a holding are broad. Prior to 1954, FHA had insured 7,068 projects pursuant to Section 608. These projects embrace some 470,000 rental units. FHA has found numerous instances of violation of the kind involved in the instant case. Fourteen such cases have been referred to the Department of Justice and a considerably larger number are currently under investigation by the housing authorities.

This case also raises serious questions with respect to the powers of a single district judge where an action for declaratory and other relief is rested upon an allegation that an act of Congress is unconstitutional.

1. The ruling of the district court, that Congress lacked the power to prohibit the renting of accommodations for terms of less than thirty days in projects approved prior to 1954, was predicated upon its conclusion that appellee had the right to rent to transients before the passage of the 1954 Act. If this premise was wrong, no constitutional question need be reached. Accordingly, we address ourselves first to the question whether such rentals were permissible prior to 1954.

a. *Renting to transients was prohibited prior to the passage of the Housing Act of 1954.* The district court disregarded the formal congressional declaration that the purpose in enacting the National Housing Act had been to preclude the use, for transient and hotel purposes, of houses built with the aid of insured mortgages. While such a declaration may not be conclusive on the courts, it is certainly entitled to great respect. *United States* v. *Stafoff,* 260 U. S. 477, 480; *First National Bank* v. *Missouri,* 263 U. S. 640, 658–659; *Bailey* v. *Clark,* 21 Wall. 284, 288; *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331. Here, the declaration is supported by an examination of the statute involved. The unmistakable purpose of Section 608 has been to furnish residential housing—originally to war workers (*supra,* p. 4), later to returning veterans (*supra,* pp. 4–5). Throughout that section and the statutes amending it, one finds expression of a single dominant aim: facilitating residential construction for families. The court below concedes that this was "the primary intent of Congress" (App. B, *infra,* p. 42). The notion of renting such residential

construction to transients, or using it as a hotel, is repugnant to this underlying purpose.

While the pre-1954 legislation did not in terms prohibit such a diversion, a consideration of the statutory purposes just discussed (and see *supra*, pp. 4–5), of the regulation issued by FHA under Section 607 of the National Housing Act, *supra*, pp. 5–6, and of the terms of appellee's own undertaking, required by Section 608 (b) (1) (*supra*, pp. 9–10), leads to the conclusion that appellee did assume the duty to rent its facilities for residential purposes only.

The pertinent regulation—24 CFR 280.34—requires that the project be *designed principally for residential use* and that it consist of not less than eight *rentable dwelling units* (*supra*, p. 6). As stated above (p. 6), the term "principally for residential use" was not intended by FHA to authorize the rental of a small portion of the project for short terms; it was designed to permit the inclusion in a project of facilities which would accommodate the needs of permanent residents, *e. g.*, professional offices and stores.[12] The regulation refers to apartments as "dwelling" units, a term inconsistent with the view that rentals to transients were contemplated.[13]

---

[12] See also S. Rept. No. 1472, 83d Cong., 2d Sess., p. 31

[13] The word "dwelling" denotes a permanent residence. *United States* v. *Tod*, 297 Fed. 385, 393 (C. A. 2). It "involve[s] the idea of a house, a residence, where persons live in a settled abode", *Barnett* v. *Vaughan Institute*, 134 App. Div. 921, 119 N. Y. S. 45, 46. Consequently, it is well established that a hotel or other place of mere temporary lodging is not a dwelling. *Thomas* v. *Commercial Union Assur. Co.*, 162 Mass. 29, 33; *People* v. *D'Oench*, 111 N. Y. 359, 361; *DeWolf* v. *Ford*, 193 N. Y. 397, 402.

In its charter, appellee assumed the obligation to limit its rentals to permanent residents. Appellee agreed unconditionally that it would engage in no business other than the operation of a *rental housing project. Prima facie,* rental to transients does not constitute rental housing. The charter also refers to the apartments as "dwelling accommodations", which again emphasizes the long-term residential character of the project.[14]

The 1954 Act thus did not retroactively impose new duties upon appellee. It directed appellant to enforce strictly the law as it theretofore existed, and it provided added remedies for that purpose. This certainly was within the power of Congress. *Ex parte Collett,* 337 U. S. 55, 71; *Crane* v. *Hahlo,* 258 U. S. 142.

b. *Congress had the power to prohibit the rental to transients in projects approved prior to the passage of the Housing Act of 1954, even if we assume, arguendo, that such practices were not illegal prior to 1954.* The Constitution does not, of course, prohibit retrospective legislation in the civil field. *Calhoun* v. *Massie,* 253 U. S. 170; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467. Moreover, the prohibition

[14] The clause that appellee's dwelling accommodations could not be rented for a period in excess of three years without appellant's consent does not mean, as the court below concluded (App. B, *infra,* p. 33), that rental for *any* shorter period was permissible. This overlooks the requirement that the apartments had to be rented as *dwelling accommodations, i. e.,* for non-temporary purposes. The fact that the maximum average rental is to be fixed on a monthly basis (p. 9, *supra*) is similarly indicative of a general understanding that the apartments would be rented on at least a monthly basis.

against impairing the obligation of contract (Art. I, Section 10, cl. 1) is in terms limited to State action. This Court has pointed out that "when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity," *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 307–308, and that a person who contracts in an area in which the legislature has exercised its power must expect further legislation on the same subject. *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38.

Nor does the circumstance that the United States is a party to a contract destroy the congressional power to modify the contract. *Lynch* v. *United States*, 292 U. S. 571 and *Union Pacific Ry.* v. *United States*, 99 U. S. 700, cited by the court below, do not hold to the contrary. *Lynch* v. *United States* recognized that Congress can annul or amend contractual relations of the United States in proper circumstances, but held that the naked desire to save money did not constitute an adequate justification, 292 U. S. at 579–580. In *Union Pacific*, this Court upheld the congressional modification of a contract to which the United States was a party; it did the same, in substance, in *North American Commercial Co.* v. *United States*, 171 U. S. 110, and *Horowitz* v. *United States*, 267 U. S. 458, 461.

As the court below recognized, rentals to transients conflicted with "the primary intent of Congress" (App. B, *infra*, p. 42). While that court nonetheless found that such rentals were not effectively prohibited, and also concluded that they were consistent with FHA regulations and with appellee's charter, this much is

clear: Rentals to transients violated the spirit of the statute and were, at the least, of questionable standing. In such circumstances, a congressional clarification of the law—one which insists upon compliance with its manifest purpose and expressly prohibits practices which were at best dubious—is neither arbitrary nor unreasonable. *United States* v. *Hudson*, 299 U. S. 498, 501; *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38; *Millikan* v. *United States*, 283 U. S. 15, 22–24; *Lichter* v. *United States*, 334 U. S. 742, 788–789; *Blanchard* v. *Reconstruction Finance Corp.*, 177 F. 2d 727, 729–730 (C. A. D. C.), certiorari denied, 339 U. S. 912. The 1954 Act, in short, impaired no legitimate rights or expectations; it demanded, rather, that those who had received valuable financial assistance from the Government, for the purpose of constructing residential housing, operate the housing in faithfulness to that purpose.[15]

2. *The district court exceeded its jurisdiction.* The decree, entered by a single district judge, rests upon the judge's determination that provisions of the Housing Act of 1954 are unconstitutional as applied to the situation presented by the case at bar. Under 28 U. S. C. 2282, however, a single district judge may not grant an interlocutory or permanent injunction restraining the enforcement, operation or execution of an act of Congress for repugnance to the Constitution

[15] The added suggestion by the district court (App. B, *infra*, p. 48) that the 1954 Act is discriminatory because of the resort-area exception has no substance. Congress could reasonably decide that strict prohibition of use for transient purposes was not desirable in resort areas because that might cause undue hardships for tourists. In any event, this appellee is not adversely affected by the exception and has no standing to challenge it.

of the United States. The requirement of a three-judge court in such cases is jurisdictional. *Ex parte Metropolitan Water Co.,* 220 U. S. 539, 545; *Cumberland Tel. Co.* v. *Public Service Commission,* 260 U. S. 212, 216–217; *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10, 13–16; *Query* v. *United States,* 316 U. S. 486, 490; *Ayrshire Corp.* v. *United States,* 331 U. S. 132, 138–139; *Riss & Co.* v. *Hoch,* 99 F. 2d 553, 555–557 (C. A. 10).

It will not do to say that a determination as to constitutionality might have been made on the basis of the Government's cross-complaint, which sought enforcement of the statute. As the recitals in the opinion and in the order of the district court make plain (App. B, *infra* pp. 26, 49 and App. C, *infra* p. 52), the court acted upon appellee's complaint. And in so doing the court restrained the enforcement of the statute, granting specific injunctive relief *against* the appellant (p. 13, *supra*).

Nor is it an answer that the complaint also requested declaratory relief. Declaratory judgments are not mere advisory opinions, and 28 U. S. C. 2202 envisages the transformation of a declaratory judgment into a compulsory one. A three-judge court is required where a declaration of right "would be in effect a decision upon the constitutionality of a federal statute, having the same force and effect as an injunction * * *". *United States* v. *149 Gift Packages, etc.,* 52 F. Supp. 993, 995 (E. D. N. Y.); *Frasier* v. *Board of Trustees,* 134 F. Supp. 589, 590–591 (M. D. N. C.), aff'd, 350 U. S. 979; see also *Rolls-Royce* v. *Stimson,* 56 F. Supp. 22, 23 (Dist. Col.).

Here, the decree is not merely injunctive in "force and effect"; it includes terms which specifically enjoin the federal housing authorities from implementing the statute which the court found to be unconstitutional.

CONCLUSION

The questions presented are of substantial importance, and this Court should note probable jurisdiction of the appeal.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
HERMAN MARCUSE,
Attorneys.

NOVEMBER 1956.

409127—56—4

APPENDIX A

THE DARLINGTON, INC., PLAINTIFF

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

Civ. A. No. 4741

UNITED STATES DISTRICT COURT, E. D. SOUTH CAROLINA, CHARLESTON DIVISION

Sept. 22, 1955

* * * * *

J. C. Long, Charleston, S. C., and Herman H. Higgins, Jr., Georgetown, S. C., for plaintiff.

Warren E. Burger, Asst. Atty. Gen., N. Welch Morrisette, Jr., U. S. Atty., Columbia S. C., Arthur G. Howe, Asst. U. S. Atty., Charleston, S. C., Edward H. Hickey and Carl Eardley, Washington, D. C., for defendant.

Before PARKER, Circuit Judge and TIMMERMAN and HOFFMAN, District Judges.

PER CURIAM.

Plaintiff is the owner of an apartment house at Charleston, S. C., covered by a mortgage which has been insured by the Federal Housing Administration pursuant to the provisions of the Federal Housing Act of 1934, 12 U. S. C. A. § 1703. The apartment house was erected and the mortgage thereon executed by plaintiff and insured by the Federal Housing Administration prior to the passage of the Federal Housing Act of 1954, 68 Stat. 590, and nothing in any of the contracts relating to the construction of the apart-

ment house, the execution of the mortgage thereon or the insuring of the same by the Federal Housing Administration limits the right of plaintiff with respect to the rental of apartments for transient purposes or for less than thirty days. Plaintiff has been renting apartments to transients and for less than thirty day periods and contends that it will sustain irreparable loss unless permitted to continue renting them in this way. Since the passage of the Federal Housing Act of 1954 the Federal Housing Administration has attempted to force plaintiff to desist from this rental practice, contending that same is forbidden by the provisions of that act. Plaintiff contends that the act should not be interpreted to apply to mortgages and guaranties thereof executed prior to its passage and that, if so interpreted, it is violative of provisions of the Constitution of the United States. In its complaint plaintiff asks a declaratory judgment establishing its rights in the premises and further asks that the commissioner be enjoined and restrained from interfering with its operation of the apartment project.

The defendant, Federal Housing Administration, and the Commissioner of the Federal Housing Administration, have filed an answer contending that plaintiff is bound by the provisions of the National Housing Act as amended and all applicable rules and regulations of the Commissioner promulgated thereunder; and, under the provisions of the Act of 1954, they ask that plaintiff be enjoined and restrained from renting apartments for less than thirty days or from charging rentals therefor in excess of the schedules approved by the Commissioner.

[1–4] The District Judge before whom the case was pending requested that a three-judge court be convened because injunctive relief was asked to restrain

the enforcement of the Act of 1954 on the ground that it was unconstitutional; and this court of three judges has been convened pursuant to his request. An examination of the pleadings in the light of the applicable law, however, has convinced the members of the court that the case is not one for which a three-judge court is appropriate. While a substantial question as to the constitutionality of the statute in question is raised, if it be given retroactive application, the real question involved is one of statutory interpretation rather than the validity of the statute and, what is conclusive on the matter of the necessity for a three-judge court, the pleadings do not disclose a case where the granting of an injunction would be proper. There is no allegation that defendants are about to institute criminal proceedings against plaintiff, and an examination of the applicable statutes fails to disclose any criminal proceedings which would be applicable to the facts as pleaded. Action under the statute against plaintiff by the Administrator would be by way of injunctive relief; and it is well settled that an injunction will not issue to restrain the issuance of an injunction. Carolina-Virginia Racing Association v. Cahoon, 4 Cir., 214 F. 2d 830, 833–834; Ritholz v. North Carolina State Board of Examiners in Optometry, D. C., 18 F. Supp. 409. Even if criminal prosecutions could be instituted, it is likewise well settled that injunction will not issue to enjoin the enforcement of criminal statutes in the absence of a clear showing that this is necessary for the protection of property rights. Carolina-Virginia Racing Association v. Cahoon, supra; Standard Oil Co. of New Jersey v. City of Charlottesville, 4 Cir., 42 F. 2d 88, 93–94; Stefanelli v. Minard, 342 U. S. 117, 120, 72 S. Ct. 118, 96 L. Ed. 138; Watson v. Buck, 313 U. S. 387, 401, 61 S. Ct. 962, 85 L. Ed. 1416.

[5] It should be noted, further, that the defendants have asked an injunction in their answer; and the court's ruling on this will determine finally the rights of the parties without consideration of plaintiff's prayer for injunction. A three-judge court is, of course, not appropriate for the determination of the Administration's right to an injunction under the act. The case, therefore, is not one in which injunctive relief to plaintiff would be appropriate in any aspect. Since there is no ground for issuing an injunction on the prayer of plaintiff, on the present state of the pleadings, there is no reason for a three-judge court; for only where injunction could be issued restraining the enforcement of a statute is a three-judge court required. See 28 U. S. C. § 2282. We think it clear that this section is to be strictly construed for the same reasons as section 2281. See Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 375, 69 S. Ct. 606, 93 L. Ed. 741; Phillips v. United States, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 391, 65 S. Ct. 732, 78 L. Ed. 1318; Ex parte Collins, 277 U. S. 565, 569, 48 S. Ct. 585, 72 L. Ed. 990.

The three-judge court will, accordingly, be dissolved and the case will be heard by Judge HOFFMAN sitting by designation in the Eastern District of South Carolina.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 4741

THE DARLINGTON, INC., PLAINTIFF

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

OPINION

This is an action by way of declaratory judgment instituted by plaintiff (hereinafter called Darlington) against defendant (hereinafter referred to as F. H. A.) seeking a declaration of Darlington's rights to lease certain apartments in a multifamily apartment building owned by it for periods of less than thirty (30) days. The defendant, acting by and through Norman P. Mason, Commissioner of Federal Housing Administration, requests dismissal of the action and affirmative relief by way of an injunction requiring Darlington to cease and desist in such practices. No issue is raised as to the failure to name the Commissioner as an original defendant; the Commissioner having waived this point in his pleadings. Defendant's motion to dismiss under Rule 12 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., was converted into a motion for summary judgment under Rule 56, thus enabling the Court to consider evidence presented by both parties and dispose of the entire controversy.

Darlington is a corporation organized and existing under the laws of South Carolina with its charter

conforming in all respects to the requirements of F. H. A., the insurer of the mortgage placed upon this modern, completely air conditioned, twelve-story multifamily apartment building erected by Darlington in the City of Charleston, South Carolina. Plaintiff urges that the practices engaged in by F. H. A. promoting the construction of these apartment buildings financed under Title VI § 608 of the National Housing Act,[1] as amended, should be considered by the Court in determining the equities involved, but there is no merit to this contention as the evidence discloses that the first application submitted was withdrawn due to the objection of certain F. H. A. officials as to the location of the project. Thereafter, a subsequent application was approved upon the insistence of Darlington's sponsors. That an error of judgment was made in the selection of a suitable location is rather obvious under the circumstances, but this affords no reason to penalize the defendant.

This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at $125,000.00, to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F. H. A. insured a mortgage to the extent of $1,357,700.00, thus leaving an investment of $318,220.11 on the part of plaintiff. While it is improbable that this represents a total cash outlay by plaintiff, it is nevertheless conceded that the amount of the mortgage is approximately 90% of the

[1] National Housing Act, approved June 27, 1934, 48 Stat. 1246, as amended by addition of § 608, May 26, 1942; 56 Stat. 303, and as thereafter amended; 12 U. S. C. A. 1701, 1743.

total cost of the building and well within the legitimate financing of "608 projects".

During the latter part of 1949 the "608" application was approved and, on December 7, 1949, a charter was granted to plaintiff by the Secretary of State of South Carolina. As heretofore noted, the charter was in accordance with a form prescribed by F. H. A. and contains, among other features, certain pertinent provisions as follows:

> * * * So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner *it shall engage in no business other than the construction and operation of a rental housing project or projects.*
>
> * * * * *
>
> (e) In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the Preferred Stock (F. H. A.), voting as a class, shall be entitled to remove all existing directors of the corporations, and to elect new directors in their stead; provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock. When such default or defaults shall have been cured, the right to elect directors shall again vest in the holders of the common stock.
>
> * * * * *
>
> SEVENTH: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by

the terms of such instruments; (3) the failure of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) *the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties,* or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

(b) In the event the mortgagor is in default under the terms of this certificate of incorporation or has failed to perform the covenants required by it to be performed under the terms of this certificate or by any mortgage insured by the Commissioner, the Commissioner may require the corporation to furnish at the expense of the corporation a complete audit of its books of account duly certified by a certified public accountant.

* * * * *

EIGHTH: *The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation,* the directors and the stockholders.

(a) (1) Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per month fixed by the Board of Directors of the corporation and approved by the holders of the Preferred Stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the Preferred Stock, prior to leasing or offering for lease of any of the dwelling accom-

modations of the project and when approved by them, shall thereafter be maintained except as provided in Article Sixth hereof. *Dwelling accommodations of the Corporation shall not be rented for a period in excess of three years* nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholder. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the Preferred Stock. (2) The corporation shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of Preferred Stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue of his lease, including, among other things, telephone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities.

(b) The corporation shall maintain its accommoditions and the grounds and equipment appurtenant thereto in good and substantial repair and condition; provided, that in the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money deriving from any insurance on the property shall be applied in accordance with the terms of the insured mortgage on the premises.

(c) The corporation, its property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents and other papers relating thereto shall be subject to

examination and inspection at any reasonable time by the Commissioner or his duly authorized agents; the corporation shall keep full and complete copies of all written contracts or other instruments which affect it or any of its property, all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.

(d) The books and accounts of the corporation shall be kept in accordance with the uniform system of accounting prescribed by the holders of the Preferred Stock.

(e) The corporation shall furnish the Commissioner within 60 days following the end of each fiscal year a complete annual financial report.

(f) At the request of the Commissioner, or of the holder of a majority of shares of the Preferred Stock, his or their agents, employees or attorneys the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested.

From a casual reading of the foregoing, it is apparent that the charter is not the constitution of an independent corporation and that the preferred stockholder (F. H. A.) is not just a shareholder. *Loftus* v. *Mason, Commissioner, etc.,* 139 F. Supp. 207, an opinion by District Judge Bryan, Eastern District of Virginia, rendered February 10, 1956. The pertinent question is the extent of the broad powers granted to F. H. A. under the charter, the by-laws, the mortgage, and any contract to which the Commissioner and the corporation are parties. In the main, the Court is of the opinion that the documents referred to are essentially to protect the financial obligation

of F. H. A. as an insurer of the mortgage, but are not so far-reaching as to restrict the right to lease individual apartments for periods of less than thirty (30) days.

The financial structure of Darlington is, as one would already assume, grounded upon the issuance of 100 shares of preferred stock at a par value of $1.00 per share, all of which is owned and held by F. H. A. The 1,999 shares of common stock are held as follows: the Long Corporation—1,996 shares; L. D. Long—1 share; Leonard L. Long—1 share; T. E. Steadman—1 share. In turn, the Long Corporation is solely controlled by L. D. Long; certain others hold qualifying shares for voting purposes. From this it will be seen that L. D. Long controls the plaintiff corporation.

The mortgage, mortgage note, and building loan agreement were executed by plaintiff on December 7, 1949, and, after some slight delay, the transaction was consummated on December 30, 1949. On the reverse side of the mortgage note in the sum of $1,357,700.00 appears the following language:

> Insured under Section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949.
>
> To the extent of advances approved by the Commissioner.
>
> FEDERAL HOUSING COMMISSIONER,
> By H. E. BAILEY,
> *Authorized Agent.*
>
> Date, December 30, 1949.

It is conceded by F. H. A. that, as of December 30, 1949, no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F. H. A., restricted the right of plaintiff to lease apartments in its project for periods of less than

thirty (30) days. In fact, the only period of limitation appears in the charter where it is said:

> Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders.

It is significant that F. H. A. saw fit to impose a maximum rental period but overlooked what is now the partial subject of this controversy.

The project was completed in July, 1951; the first day of occupancy being July 27. By October 9, 1951, only 70 of the 156 apartments had been rented. As the project analysis contemplated a 7% vacancy, the plight of Darlington was inevitable. With no capital to purchase furniture for any of the apartments, the Long Corporation provided same and, from October 9, 1951, to February 21, 1952, furniture was provided in certain apartments rented for thirty (30) days or more. Beginning February 21, 1952, plaintiff rented furnished apartments to tenants for periods of less than thirty (30) days, as well as in excess thereof. This practice has been increasingly remunerative to the point that, for the first six (6) months of 1955 (the last period under consideration by the Court), plaintiff showed an operating profit as contrasted with net operating losses for all prior periods.

Darlington secured approval of its maximum average rental per room per month on September 13, 1951. There is no contention that plaintiff has charged in excess of this schedule unless the charge for furniture is considered. Plaintiff has not requested an approval of rentals for furnished apartments as F. H. A. has taken the position that such approval will not be given unless Darlington executes a letter agreeing not to lease any portion of the premises to any person for less than thirty (30) days.

F. H. A. first directed plaintiff's attention to the matter of furnished apartments and the agreement necessary to secure approval of a furnished apartment schedule by letter dated December 5, 1952. Apparently F. H. A. was not disposed to force the issue at that time but awaited the passage of the Housing Act of 1954, Public Law 560, 83rd Congress, Chapter 649, 2nd Session, J. R. 7839, 12 U. S. C. A. § 1731 (b).[2] The subject was thereafter brought to

[2] The pertinent portions of the Housing Act of 1954 are quoted at length as follows:

"SEC. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that *this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.*

"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

"(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) *no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance*

life by letter of F. H. A. to plaintiff dated January 4, 1955, which did not make reference to the Housing Act of 1954. In reply, Darlington made a fair disclosure of its operations as to furnished apartments and inquired as to what provisions of law or charter prohibited the renting of apartments for a period of less than thirty (30) days. Plaintiff's letter was referred to defendant's Deputy Assistant Commissioner who, in turn, then directed plaintiff's attention to the Housing Act of 1954. The present action followed this exchange of correspondence.

---

remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

"(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

"(e) As used in this section, (1) the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term 'multifamily housing' shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of sub-

section (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3) (B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (3) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices, constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

The rather unique method employed by plaintiff in handling the rental of furnished apartments is the proper subject of close scrutiny. A party seeking one-night occupancy at The Darlington is accepted, directed to his room, and, upon leaving, is given a receipt (by way of illustration) in the sum of $6.00 with only plaintiff's name printed thereon. In the lower left corner of this receipt appears appropriate spaces for the allocation of the $6.00 as to rent, telephone, and "furniture rent". Plaintiff thereupon takes the copies of the receipt and credits one-thirtieth of the maximum average rental per room per month to the item "rent", with the balance being allocated to "furniture rent". For example, the sum of $2.58 would be charged to "rent" and $3.41 to "furniture rent". At least monthly the "furniture rent" credits are paid to Long Corporation, the owner of the furniture. This rather ingenious scheme is a mere subterfuge and the Court has no patience with same. Furthermore, Long Corporation pays no rent to plaintiff for the apartments in which its furniture remains, whether occupied or not. It may be argued that the availability of furnished apartments promotes the rentals, but F. H. A. admittedly controls the rental schedule on both furnished and unfurnished apartments. While the Court concludes that FHA cannot prohibit the leasing of apartments for periods of less than thirty (30) days, and cannot insist upon any agreement to desist from such practice, it is neverthe-

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

less true that F. H. A. controls the maximum rentals at all times and an injunction must issue against plaintiff prohibiting the leasing of furnished apartments for any period of time until and unless a schedule has been duly approved; the injunction to become operative after F. H. A. has approved a fair and reasonable rent schedule for furnished apartments which need not coincide with any monthly schedule heretofore approved. Whether Darlington is the owner of the furniture is immaterial as the rental of the apartment, furnished or unfurnished, is an integral part of the entire operation.

A study of the National Housing Act enacted June 27, 1934, 48 Stat. 1246 (1934), together with numerous amendments and additions thereto, with particular reference to Title VI, § 608, leads to the inevitable conclusion that it was the intent of Congress to provide housing accommodations on the mortgaged property *designed principally for residential use.* It is so stated in the Administrative Rules and Regulations of F. H. A. in existence as of the date of the insuring of the mortgage herein. F. H. A. insists that the word "principally"was intended to permit insurance of apartments on which commercial facilities were planned, such as drug counters, snack bars, etc. Plaintiff advances the theory that the word "principally" necessarily implies a right to rent to so-called transients, and argues that the doctrine of *expressio unius est exclusio alterius* is applicable. In any event the word "principally" cannot be construed to mean "exclusively". It is not for this Court to delete or distort the words of Congress or the Commissioner. *62 Cases, etc.* v. *United States,* 340 U. S. 593, 71 S. Ct. 515, 95 L. Ed. 566; 82 C. J. S., "Statutes", p. 530, § 312. Does the leasing of certain apartments for periods of less than thirty (30) days

alter the words "principally for residential use"? The Court does not believe that such an arrangement violates the intent of Congress when all factors mentioned herein are taken into consideration.

There has been no contention that plaintiff has failed to give preference to war workers and veterans, or has discriminated against families with children. These are requirements of the Act, but are not in issue. It is conceded that no person entitled to priority has ever been rejected, and no one desiring so-called "permanent" occupancy of an apartment has been required to wait any time to obtain same. While these provisions tend to support the view that this multifamily apartment was designed "principally for residential use", it may also be argued that the interpretation now requested by F. H. A. could have the effect of depriving a veteran of the preference granted to him by Congress in the event he wished to occupy an apartment for a period of less than thirty (30) days.

As the emergency created by returning veterans of World War II came to an end, the demand for multifamily apartments in certain areas was materially reduced. Faced with the necessity of maintaining mortgage payments, reserves for depreciation, operating expenses, etc., mortgagors sought other means of income in order to protect their investments. Furnished apartments proved to be an incentive for rentals and apparently F. H. A. has approved of such methods, thereby permitting a reasonable number of apartments to be rented on schedules duly submitted and approved. It is admitted that, prior to the passage of the Housing Act of 1954, F. H. A. granted permission in from 12 to 15 projects to rent for periods of less than 30 days, the right of which is contended to be under F. H. A.'s broad power of control

of "methods of operation". When the attention of the American Hotel Association was directed to instances of so-called transient rentals, a stern protest was registered which ultimately brought about the enactment of the Housing Act of 1954. The plaintiff herein does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients. Contrary to the contention of plaintiff, any such action would, in the opinion of the Court, violate that provision of the charter which prohibits engaging in any business other than the operation of a rental housing project. But the mere acceptance of transients as tenants does not, in and of itself, convert a rental housing project into a hotel. During March, 1955, there were 121 individual instances of rentals for less than thirty (30) days, of which 48 remained one day, 22 for two days, 12 for three days, 20 for seven days, etc. As March may be considered generally as the season of greatest demand for transients in Charleston, it is not unlikely that the figures quoted above give the largest illustration of so-called transient rentals. For that month there appeared to be an average of 15 furnished apartments rented, or available for rent, for periods of less than thirty (30) days. This is tantamount to approximately ten per centum of the entire available occupancy. This Court is not of the opinion that a ten per cent rental allocation for persons desiring space for periods of less than thirty (30) days is the equivalent of converting the project into a hotel when unaccompanied by any act of advertising for transients as a hotel. While the factual situation is somewhat different, this Court leans to that part of the opinion in *People* v. *Goldfogle,* 121 Misc. Rep. 341, 201 N. Y. Supp. 262, 264, where it is said:

> The mere fact that a building constructed and operated as a hotel in the common acceptance of that term may be occupied by a few tenants on long leases would certainly not change the character of the building as a whole. The converse is true here. The rooms occupied by transients, forming but 20 per cent. of the total number of rooms, are being so used only temporarily in order to derive an income therefrom pending attempts to lease them for long terms, like the rest of the rooms. Even the "transient" rooms are charged for by the room, and not by the number of persons who may occupy them. The building is without any of the public rooms or public accommodations usually associated with the idea of a hotel. Under these circumstances, I think that the building is to be regarded as having maintained its original character of an apartment house, unaffected by the casual fact that some of the rooms are temporarily devoted to purposes which have some of the elements of hotel accommodation.

The unusual situation created by reason of F. H. A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial investment, together with the monthly payments of $6222.79 each, beginning June 1, 1951, as well as a reserve account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commissioner of F. H. A. acquiring title as it is a fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn, sells the property without regard

to any limitation as to use, etc., unless, of course, F. H. A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F. H. A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit.

The position of the American Hotel Association is not without merit. Investments in hotels are substantial and such enterprises have been without the aid of 90% to 100% financing guaranteed by an agency of the United States. The promotion of motels has made serious inroads on operation of hotels. It may be readily understood why the Hotel Association exerted its efforts to persuade Congress to pass the Housing Act of 1954, thus defining transient rentals and prohibiting leases in F. H. A. insured projects for periods of less than thirty (30) days. As to projects committed subsequent to the passage of the 1954 Act, there can be no question as to its constitutionality or applicability. But with respect to projects already in operation, this Court has concluded that the Housing Act of 1954 is ineffective as, under the circumstances, it cannot be made retroactive. A careful study of the 1954 Act will illustrate that plaintiff's right to lease for periods of less than thirty (30) days undoubtedly existed prior to that date despite the primary intent of Congress. Under what theory, then, may Congress take away that right which is not, in itself, contrary to any law, rule, or regulation? This case does not involve the exercise of police power, war powers, zoning laws, tariff laws, export and import licensing, emergent or tax legislation—all of which have, in one form or another, upheld the validity of retroactive legislation. When the United States enters into con-

tractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. *Lynch* v. *United States,* 292, U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. As was said in *Union Pacific Railway Co.* v. *United States,* 99 U. S. 700, 25 L. Ed. 496, 504:

> The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

To the same effect, see: *The Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629. Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transac-

tion and hence must fail. 16 C. J. S., "Constitutional Law", § 417, p. 861. To open an avenue for retroactive or retrospective laws in the field of contracts not dealing with police, war, or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects. In substance, there must be a stopping point somewhere, and this appears to illustrate the dangers involved where Congress has yielded to the requests of a third party with knowledge that there will be a financial loss to the mortgagor and, to a limited extent, the taxpayers.

It is the duty of the Court to determine the intent of Congress as to the meaning of any law passed. *Stockdale* v. *The Insurance Companies,* 20 Wall. (87 U. S.) 323, 22 L. Ed. 348; *Town of Koshkonong* v. *Burton,* 104 U. S. 668, 26 L. Ed. 886. The expressions of the members of the legislative body are entitled to respect and consideration in determining what the rule or law was at the time of passage, but if the Court is reasonably satisfied that the later expression or construction is erroneous, the same should be disregarded. It is interesting to note that, at the time of the hearings on the Housing Act of 1954 before the Senate Committee on Banking and Currency, Senator Capehart, who presided over the meeting, said:

> I didn't write the law, it was written back in 1940. I wasn't here, so I can't tell what the intention was.

While it may be assumed that some members of Congress in 1954 were also members in 1940, and even in 1934 when the original National Housing Act was passed, there is no affirmative intimation of Congressional intent other than from the wording of the 1954 Act and the Committee reports. In truth and in fact, the question now under consideration was never given

a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention.

If the Administrative Rules and Regulations for Rental Housing Insurance under Section 608 of the National Housing Act, as amended May 22, 1946 (which Rules and Regulations were in existence at the time of the commitment, insurance and construction of the Darlington project), are to be given any effect as to the intent of Congress prior to 1954 or as to the final determination of this case, it is abundantly clear that there was no intention to thereafter create a new obligation with respect to a past transaction assuming, of course, that the operation by the mortgagor was not per se unlawful. Article VIII of said Rules and Regulations covering the matter of "Amendments" states:

> These Regulations may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendments shall not affect the contract of insurance on any mortgage already insured* or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure.

At the time hearings were conducted before the Senate Committee on Banking and Currency in March, 1954, Mr. Arthur J. Packard, Chairman of the Board of the American Hotel Association, made this pertinent statement:

> As I mentioned before, we have tried for four or five years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743 (b) (i), in connection with section

> 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always required approval of all rent schedules. And these were normally expressed in monthly rentals. But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice. (Page 656, 657. Hearings before Senate Banking and Currency Committee on Housing Act of 1954.)

The statement of Mr. Packard is questioned by the testimony of the Director of the Legal Division of F. H. A. as being somewhat erroneous, but the fact that F. H. A. apparently did not resort to any legal process in an effort to bring about a cessation of such practices affords a fair assumption that the interpretation placed thereon by the Administrative Agency was at least doubtful.

It is true that the Commissioner has always retained the authority to regulate rents, charges, and "methods of operation". This is so specified in the Act. 12 U. S. C. A. 1743 (b) (1). What, then, is the meaning of the words "methods of operation"? Should it be given a broad interpretation which would, in effect, grant to F. H. A. the rights ordinarily reserved to an owner of real estate? The answer to these inquiries may be found in the interpretation placed thereon by F. H. A. In a bulletin entitled "Multifamily Rental Housing Insurance" providing for the Administrative Rules and Regulations under Section 207 of Title II of the National Housing Act,

revised August 13, 1954 (the forerunner and successor of Section 608), the Commissioner significantly points out what is meant by the term "Methods of operation". Reg. § 232.19 (f). Without quoting verbatim what is contained therein under "methods of operation", it is sufficient to state that, for the proper consideration of this case, the items mentioned are substantially the same as the items referred to in Darlington's charter subsequent to the words, "The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and the stockholders". True, in the 1954 revision, a special clause was inserted in Reg. § 232.20 (b) under the heading "Special certificates and contract to be executed by mortgagor", prohibiting the rental of any part of the property "for transient or hotel purposes", and further providing that the mortgagor's charter shall contain like provisions. This is potent evidence of the fact that, prior to 1954, it had never been the intention of F. H. A. or Congress to prohibit any practice of leasing for periods of less than 30 days, and, further, that the term "methods of operation" was not intended to include a like prohibition. If such is not the case, what would be the purpose of F. H. A. in requiring these specific provisions in corporate charters?

Assuming arguendo that plaintiff's stockholders had sold their stock in Darlington shortly after the completion of the project, how would any new owner of the capital stock ascertain that such an intent or regulation existed as now suggested by F. H. A.?

It must be recalled that F. H. A. is in the insurance business and that Congress, in launching a governmental agency into the commercial world, endowed it with the authority to sue and be sued and contem-

plated that it would be treated as any private enterprise. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724. Similarly, it has been held that regulations promulgated by F. H. A. are to be construed against F. H. A. *Ferguson* v. *Union National Bank,* 4 Cir., 126 F. (2d) 753, an opinion by Chief Judge Parker; *Garrison* v. *United States,* 7 Wall. 688, 690, 19 L. Ed. 277. Adopting this rule of construction, there is no sound reason for arguing that plaintiff did not have a right given to it in the legitimate use and enjoyment of its property to rent a reasonable number of apartments for periods of less than thirty (30) days. Furthermore, there is no magic in the selection of thirty (30) days.

The Housing Act of 1954 discriminates against plaintiff in that it empowers the Commissioner to exclude the operation of the "transient rental" clause located in a resort area from the provisions of the Act if a portion of the accommodations in the project had been made available for rent for "transient or hotel" purposes prior to May 28, 1954. Through the efforts of Senator Smathers (Florida), this provision was inserted and, in effect, the entire State of Florida was designated as such. The "608 projects" in Florida and other resort areas were constructed under the same charter, mortgage, rules and regulations as was Darlington. Moreover, it will be noted that the sales promotion advanced by F. H. A. during the years following World War II and prior to the Korean War suggested to sponsors that mortgages could be refinanced or insured for additional terms if the same became necessary. While there is no legal obligation upon F. H. A. to insure for an additional term, the Housing Act of 1954 effectively forecloses this possibility as to all multifamily housing projects

except those which are excluded by reason of being situated in resort areas.

Additionally, Congress apparently was uncertain as to its right to legislate retroactively when it inserted in the 1954 Act the words:

> *Provided,* That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

That the 1954 Act is designed to afford relief for private interests, as distinguished from public purposes, is further evidenced by the clause which grants a right to any person owning or operating a hotel within a radius of fifty miles from the "project" to institute an action in the appropriate District Court enjoining the alleged violation.

Even assuming the right of Congress to delegate the power to "regulate" to an administrative agency, the agency exercising such authority pursuant to contract will not be permitted to negate the plain words of the contract by adding regulations subsequent to the date the agency committed itself. Such authority would completely destroy the contract.

A decree will be prepared by counsel for plaintiff adjudicating its rights under the declaratory judgment action, stating in substance:

1. The defendant and its Commissioner have no right to prohibit the rental of a reasonable number of apartments in The Darlington for periods of less than thirty (30) days, as long as priorities are maintained for the persons entitled thereto and no proper person desiring occupancy for a period of thirty (30) days or more is thereby precluded from obtaining accommodations.

2. If any of said accommodations are furnished by plaintiff, or permitted to be furnished by plaintiff, said plaintiff shall promptly submit to defendant a proposed schedule of maximum average rentals (including furniture and other incidentals) and, if fair and reasonable under all the circumstances, defendant shall approve said schedule and plaintiff will thereupon be enjoined from making any rental charges, directly or indirectly, in excess of the approved schedule.

3. The defendant may not insist upon plaintiff's execution of any agreement to desist from renting for periods of less than thirty (30) days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three (3) years, irrespective of the minimum time of leasing.

4. The plaintiff has no right to advertise as a hotel or to advise the general public through any medium of advertising or letters of its willingness to accept so-called transients; nor may plaintiff obtain any license to operate as a hotel or post any signs indicating its ability to accept any tenant for periods of any particular duration. No injunction need issue as to such matters as there is no contention that plaintiff is operating as such.

5. Both parties having prevailed herein to a limited extent, the taxable costs, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, shall be equally divided.

6. Should either party file a notice of appeal within the time permitted from the date of the entry of the decree to be submitted, the effectiveness of said decree will be stayed for a period of forty (40) days to permit the appealing party or parties to obtain an

appeal to said decree in the Court of Appeals for the Fourth Circuit, if they be so advised.

(Sgd) WALTER E. HOFFMAN,
United States District Judge
(Under Designation).

NORFOLK, VIRGINIA,
June 20, 1956.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 4741

THE DARLINGTON, INC., PLAINTIFF

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

DECREE

This cause came on to be heard upon plaintiff's complaint by way of declaratory judgment and defendant's motion to dismiss the complaint under Rule 12 (c) of the Federal Rules of Civil Procedure, which was converted into a motion for summary judgment under Rule 56, and evidence having been offered, briefs filed and argument presented by both parties, and upon consideration thereof, the Court having filed its opinion on June 21, 1956, disposing of all issues involved, now pursuant to said opinion, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided the required priorities are maintained for the persons entitled thereto, namely, veterans of World War II, and their immediate families, and provided that no proper person

desiring occupancy for a period of thirty days or more is thereby precluded from obtaining unfurnished accommodations, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered. The parties have stipulated that, for the purpose of the Court's opinion filed herein, the maximum number of apartments available for lease for terms of less than thirty days shall not exceed fifteen percent of the total number of apartments in the project until the further order of Court or subsequent agreement between the parties.

(2) The plaintiff shall promptly submit to the defendant a proposed schedule of the maximum average rentals (including furniture and other incidentals and services) for any furnished accommodations in said building, and if fair and reasonable, under all the circumstances, the defendant shall promptly approve said schedule without regard to any monthly rental schedule heretofore approved, and in approving said schedule, the defendant shall take into consideration extra services and incidentals necessarily furnished with such apartments which may be rented for less than thirty days, and the plaintiff shall thereupon be enjoined from making any rental charges directly or indirectly in excess of the approved schedule.

(3) The defendant may not insist upon the execution by the plaintiff of any agreement to desist from renting for periods of less than thirty days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three years, irrespective of the minimum time of leasing.

(4) The plaintiff has no right to advertise as a hotel or to advise the general public through any medium of advertising or letters, of its willingness to accept so-

called transients; nor may plaintiff obtain any license to operate as a hotel, or post any signs indicating its ability to accept any tenant for periods of any particular duration; nor shall it provide bell boy or food and beverage room service.

(5) The taxable costs of this action, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, are to be borne equally by plaintiff and defendant, one-half of such costs to be taxed against each party.

(6) Should either party file a notice of appeal within the time permitted from the date of entry of this Decree, the effectiveness of said Decree will be stayed for a period of forty (40) days to permit the appealing party or parties to obtain an appeal to said Decree in the Court of Appeals for the Fourth Circuit, if they be so advised.

(Sgd.) WALTER E. HOFFMAN,
United States District Judge.

NORFOLK, VIRGINIA,
July 18, 1956.

APPENDIX D

1. Section 608 of the National Housing Act, 56 Stat. 303, as amended, 12 U. S. S. 1743, provides in pertinent part:

> SEC. 608. (a) In addition to mortgages insured under section 603 of this title, the Commissioner is authorized to insure mortgages as defined in section 601 of this title (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided.
>
> (b) To be eligible for insurance under this section a mortgage shall meet the following conditions:
>
> (1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the War Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.
>
> (2) Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Commissioner, shall be provided under such regulations and procedures as may be prescribed by the Commissioner.
>
> * * * * *

2. Section 513 of the National Housing Act, added by Section 132 of the Housing Act of 1954, 68 Stat. 610, 12 U. S. C. 1731 (b), provides:

> SEC. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.
>
> (b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).
>
> (c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) no mortgage with respect to multifamily housing shall be insured

for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided,* That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

(e) As used in this section, (1) the term "rental for transient or hotel purposes" shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term "multifamily housing" shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corpora-

tion or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3) (B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (d) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section.

3. 28 U. S. C. 2282 provides:

Injunction against enforcement of Federal statute; three-judge court required. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

U. S. GOVERNMENT PRINTING OFFICE: 1956